Was it proved to the satisfaction of the court that:
(a) the offence committed by the respondent was for using a net prohibited by the regulations; and
(b) the vessel was the subject matter of the offence or was used in the commission of the offence?

If it was, then the court had no alternative but must under section 15(1) order its forfeiture.

We are of the opinion that both conditions had been satisfied and that therefore the mandatory order should have been made. First, undoubtedly the respondent had used a net prohibited by the regulations. Secondly, even if the boat was not the subject matter of the offence and only the net was, there is no doubt that it (the boat) was used in the commission of the offence of using for the purpose of fishing a net described in the schedule, a net totally prohibited by law. The vessel was in the same position as a parang used by a killer. The parang was not the subject matter of the offence, but it certainly was a thing used in the commission of the offence of killing.

Moreover, the words "used with boat propelled by engine" in the description of *pukat rawa* in the schedule to the regulations clearly envisages its use *with* a boat, unlike say a *jala* which may or may not be used with a boat. What the regulations prohibit is the use for the purpose of fishing of this kind of net if and only if used with a boat propelled by an engine. They do not prohibit its use without a boat or with a boat without an engine. Thus, the use of an engined boat is a *necessary* ingredient of the offence, or to adopt the expression used by Abdul Razak J. at page 283 in *Juk de Sa* v. *Public Prosecutor*[2] an "inseparable part" or an "indispensable part" of the operation of the *pukat*, and to adopt the expression used by Hashim Yeop A. Sani J. at page 148 in *Ong See Ke* v. *Public Prosecutor*[1] such use was "concomitant" with such operation, though the charges in these two cases were under different provisions of the law. We agree with these two decisions.

Applying the same line of reasoning, it would therefore appear that we were in error in *Public Prosecutor* v. *Lee Chin Chai*.[3] There the accused was convicted of a charge of having in his possession on board a vessel a fishing appliance without a licence, an offence contrary to regulation 3(b) of the Fisheries (Maritime) Regulations, 1967, P.U. 49 of 1967, and it was held that only the fishing appliance could be the subject matter of the offence and the vessel in which it was found was not included and therefore it was not mandatory for the court to order its forfeiture. Regulation 3(b) provides:

"No person shall —
(b) have in his possession *on board a vessel* any fishing appliances . . . ;
unless there is in force in respect of such . . . appliances a licence or permit."

Because of the words italicised, in our view, you do not require a licence to possess a fishing appliance in a shop, a house, a car or on the beach. You require one if it is on board a vessel used for fishing like the one in that case. Thus the use of a vessel is an essential ingredient of the offence of possession of a fishing appliance without a licence and so if you commit this offence, the vessel is necessarily used in the commission of the offence.

Returning to the instant case, as the use of the prohibited *pukat rawa* is an offence only if accompanied by its use with a boat propelled by an engine, this boat is, in our judgment, a "vessel in respect of which a Fisheries Officer had reason to believe that an offence had been committed contrary to the regulations" within section 14(1) and that is why we think that it was liable to forfeiture.

In our judgment, the answers to the questions put to us are as follows:

(1) The boat referred to in the Schedule to the Fisheries (Prohibition of Method of Fishing) Regulations, 1971, is liable to seizure under section 14(1) of the Fisheries Act, 1963, because the Fisheries Officer had reason to believe that an offence had been committed contrary to the regulations.

(2) When it is proved to the court's satisfaction that an offence under section 13(1) of the Act has been committed of using a net prohibited by the regulations and the boat was used in the commission of the offence, the court is bound under section 15(1) to make an order for the forfeiture of the boat.

We make no order regarding this boat, as we understand that all that is required of us is to give a ruling to govern pending and future cases.

Questions answered.

Solicitors: *Radzi Sheikh Ahmad & Partners.*

UNITED HOKKIEN CEMETRIES, PENANG v. THE BOARD, MAJLIS PERBANDARAN PULAU PINANG

[F.C. (Raja Azlan Shah, Chang Min Tat & Syed Othman F.JJ.) December 7, 1978 & February 16, 1979]

[Penang — Federal Court Civil Appeal No. 133 of 1978]

Local Government — Rates — Exemption of building used exclusively for religious worship — Whether a columbarium a place used for religious worship — Whether columbarium a burial ground — Municipal Ordinance, (S.S. Cap. 133), s. 59(5) — Local Government Act, 1976, s. 134.

Interpretation of Statutes — Literal interpretation — Interpretation to promote the general legislative purpose.

Administrative Law — Discretion — When High Court can overrule exercise of discretion — Refusal to exercise discretion based on wrong interpretation of law.

In this case the respondent had served a notice of a proposed amendment of assessment on a property described as a columbarium. The land on which the columbarium was erected was a cemetery for members of the Hokkien community in Penang. A crematorium had also been erected on the land. Both the cemetery grounds and the crematorium had been exempted from assessment. But in respect of the columbarium, the respondent turned down the objection of the appellant as did the High Court on appeal therefrom. The appellant appealed to the Federal Court.

Held, allowing the appeal; (1) the keeping of urns containing the cremated ashes of the dead as a form of honour or regard for the mortal remains of the dead was a form of religious worship;

(2) the columbarium in this case was not on the facts used for pecuniary profit and the State Authority has a discretion to exempt it from rates;

(3) in this case the State Authority had refused to exercise its discretion because of the wrong interpretation given that a columbarium is not a place used exclusively for religious worship;

(4) the matter should therefore be referred back to the State Authority for its decision in all the circumstances of the case whether or not to extend the discretion which is available to the columbarium.

Cases referred to:-

(1) *Crosford* v. *Universal Insurance Co.* [1936] 2 K.B. 253.

(2) *Barrel* v. *Fordree* [1932] A.C. 676.

(3) *Cape Brandy Syndicate* v. *I. R. C.* [1921] K.B. 64.

(4) *Kammins Ballrooms Co. Ltd.* v. *Zenith Investments (Torquay) Ltd.* [1971] A.C. 850.

(5) *Northman* v. *Barnet Council* [1978] 1 W.L.R. 221.

(6) *Louis Blom-Cooper* v. *Attorney-General* [1979] 1 M.L.J. 68.

FEDERAL COURT.

Chandran Nair for the appellants.

Ghazi Ishak for the respondents.

Cur. Adv. Vult.

Chang Min Tat F.J.: By notice dated August 26, 1976, the Valuation Department of the Board of Management, Local Government, Penang (the respondent) served a notice of a proposed amendment of assessment on a property described as a columbarium next to No. 177 Batu Gantong Road, Penang on the Secretaries and Treasurers of the United Hokkien Cemetries (the appellant) on the ground that the property had not previously been assessed. The assessment was to be with effect from August 28, 1975 on an unreduced annual value of $4,000.

The land on which the columbarium is erected is a cemetery for members of the Hokkien community in Penang. Though it is nowhere stated, it is to be assumed that it is licensed for such use. A crematorium has also been erected on the land. Both the cemetery grounds and the crematorium have been exempted from assessment.

But in respect of the columbarium, the respondent turned down the objection as did the High Court in Penang on appeal therefrom. The appellant now appeals to this court.

The *Shorter Oxford English Dictionary* defines a columbarium primarily as a pigeon-house or a dovecote from its derivation from "columba," the Latin word for a dove. A derivative meaning however occurs in Roman Antiquities, a subterranean sepulchre with niches in its walls for cinerary urns, i.e. urns containing the cremated ashes of the deceased. It is obvious that in this case the word columbarium is used to mean a repository for cinerary urns and though this court is without advice that it is not in fact subterranean, I rather believe that it is a building above ground.

At the relevant time, the provision for exemption from assessment was contained in section 59(5) of the Municipal Ordinance (S.S. Laws Cap. 133):

"59(5). All buildings used exclusively as places for religious worship, all duly licensed public burial and burning grounds used exclusively for such purpose, all buildings used exclusively for public schools or for charitable purposes or for the purposes of science, literature or for the fine arts and not for pecuniary profit . . . shall be exempted from the payment of such rate or rates."

It is accepted by both parties that this subsection is mandatory and that any building or ground falling within any of the groups set out is exempted from the payment of rates. The short argument of the respondent is that a columbarium does not come within any of the provisions of this subsection. There being no discretion given by the statutory provisions, that was therefore the end of the matter. The respondent argues for a strict and literal interpretation of the section.

The appellant however seeks to come under the first provision of a building used exclusively as a place for religious worship. On the evidence disclosed in the affidavits, that the storage of cinerary urns is not restricted to Chinese who are Taoists and who practise ancestral worship but is available to other races and presumably non-Taoist Chinese who do not practise ancestral worship, the learned judge held that the columbarium was not used exclusively as a place for religious worship. He was prepared to accept that the use of a temple for other purposes such as meetings, marriage ceremonies, classes or even recreational activities will not, in his words, "defeat exemption, unless, on the facts, these activities render it incapable of being considered a place of *public* religious worship or unless those activities involve a letting of the premises for profit" (emphasis supplied).

Quite clearly and with respect, the requirement of a place of public religious worship is a completely unjustified extension of the then statutory provisions. The question for decision by the court is whether the columbarium is used exclusively for religious worship and by this court, whether the High Court was right that the fact or availability of the use by some persons who do not practise ancestral worship militated against the requirement of exclusive user, which is necessary to enjoy exemption from rates.

In my view and with respect, to say that because a few of the urns in the columbarium belong to persons who do not belong to the Taoist religion and practise ancestral worship, it must mean that the building is not used for religious worship exclusively, would be to contend that the practice of keeping urns without worship in the form and according to the rites of the Taoists is not, in the view of the High Court, an act of worship. That would be to misinterpret the word "worship". It is already implied by the acceptance of ancestral worship as a religious practice that worship is not used in the strict sense of adoration of a divinity. Confirmation is found in the *Shorter Oxford English Dictionary* definition of worship which is in these words:

"1. To honour or revere as a supernatural being or power or as a holy thing; to adore with appropriate acts, rites or ceremonies. To regard with extreme respect or devotion; to 'adore'. To engage in worship; to perform or take part in the act of worship. 2. To honour; to regard or treat with honour or respect; to salute, bow down to. 3. To invest with or raise to honour or repute; to confer honour or dignity upon."

If it is accepted that a deceased ancestor does not become a supernatural being or power or a holy thing by the fact of death, then it seems to me that the exclusion of other forms of honour or regard for the mortal remains of the dead as religious worship is justified neither by definition nor by good sense.

Such a view, to my mind, does not offend against the literal interpretation urged on this court by the respondent. It ought to be seen that it is not a matter of presumption in cases of ambiguity (*Crosford* v. *Universal Insurance Co.*[1] *per* Scott L.J. at p. 280) or a departure from the clear meaning of words in a statute (*Barrel* v. *Fordree*[2] *per* Warrington L.J. at p. 682), relied on by the High Court or as urged on this court, the strict interpretation of a taxing act, as in *Cape Brandy Syndicate* v. *I.R.C.*[3] *per* Rowlatt J. at p. 71. The question of the determination of the exact nature and extent of a taxing act is rather different from that of the nature and extent of exemptory provisions. Then, in my view, it is a matter for the purposive approach to replace the literal. As was said by Lord Diplock in *Kammins Ballrooms Co. Ltd.* v. *Zenith Investments (Torquay) Ltd.*[4] at p. 899, the literal method of construction is now completely out of date and has been replaced by a "purposive approach". It ought to be noted that this purposive approach is not a modern fashion. Since the 17th century, it has been the task of the judiciary to interpret an Act "according to the intent of them that made it": *Coke 4 Inst. 330.*

Per Lord Denning M.R. in *Northman* v. *Barnet Council*[5] at p. 228:

"In all cases now in the interpretation of statutes, we adopt such a construction as will 'promote the general legislative purpose' underlying the provision. It is no longer necessary for judges to wring their hands and say: 'There is nothing we can do about it'. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it — by reading words in. if necessary — so as to do what Parliament would have done, had they had the situation in mind."

It seems to me that this purposive approach was used by the respondent itself in granting exemption from rates to the crematorium, because, in my mind, by no other means can this building be exempted. It is neither a building used exclusively for religious worship because presumably some are cremated who do not believe in religion or practise cremation as an act of religious worship nor is it a "burning ground" in the strict sense of the word as distinct from a building. Conceivably when the Ordinance was enacted (it was enacted in 1913), there was no crematorium as such or prospect of any and all that the public had or the section of the public which practised cremation had, was an open space for the purpose, with at the most a temporary shed of sorts when the necessity for protection from the elements arose. Strictly construed, a burning ground does not include a building and a crematorium can under section 59(5) obtain a mandatory exemption from rates only by an extended or purposive interpretation of the subsection.

I see no reason therefore why the same interpretation should not be extended to a columbarium and the repose of the ashes of the departed kept in their honour and in memory of them should not be regarded as a religious worship when it is not accompanied by the rites of Taoism. Care in securing the repose of the remains of the dead must surely mean and connote an act of honour and respect for the mortal remains in memory of those departed which brings it within the definition of worship with a connotation in the context of religious worship.

I now turn to the question of pecuniary profit in section 59(5). If the phrase "and not for pecuniary profit" qualifies each and every category of buildings or places listed for exemption and a building used exclusively for religious worship is therefore required to be not for pecuniary profit before it can qualify for exemption, the evidence which was largely unchallenged was that for the 3000 niches a sum of either $400 for a class A niche and $200 for a class B niche was collected from which the construction was paid for and the balance devoted to the maintenance in perpetuity of the columbarium and the services it provides. The constitution of the organisation is a welfare one and it is not profit-orientated or profit-making. The members of the Board of Management are all honorary. The learned judge referred to this evidence without deciding whether the application failed by reason of it being for pecuniary profit, but on this evidence which as I have noted, was largely unchallenged, the appellant has obviously cleared this hurdle.

It has not been argued before this court or in the High Court whether the columbarium could come under a burial ground and this court is therefore without advice, *inter alia,* whether the columbarium is required to be licensed. But subject to further consideration, it does seem to me, without saying more than this, that keeping the remains of the dead reduced to ashes and in a cinerary urn is as much a burial as an interment of the corpse underground. The time surely is not so far off, particularly in a land-locked island as Penang when physical limitations must frown on interment in favour of cremation and every encouragement should be given as a matter of public policy to crematoria and columbaria.

This unfortunately is not the end of the appeal. When the originating motion was taken out on June 9, 1977, section 59(5) was already repealed. It had been replaced with effect from December 15, 1976 by section 134 of the Local Government Act, 1976. The section reads

"134. When any holding or part thereof is used exclusively —

(a) as public places for religious worship;

(b) as licensed public burial grounds or crematoria;

(c) for public schools;

(d) as public places for charitable purposes or for the purposes of science, literature or the fine arts,

and not for pecuniary profit, the State Authority may at its discretion exempt such holdings or such part thereof from the payment of any rate."

From January 1, 1977, the matter is now discretionary. But there is a new requirement. As a place of worship, it must be public. No difficulty needs arise in this regard, as the evidence is that while the columbarium is meant primarily for Taoist members of the Hokkien community, it is also open to those mem-

bers of the public who would avail themselves of the facilities it has to offer.

The High Court would not interfere with the exercise of this discretion, resulting in a refusal to grant exemption from rates by the Council. The area in which an appellate court can overrule the exercise of its discretion by a lower court is very limited, but quite clearly where the lower court's refusal is based on a wrong interpretation of the law, an appellate court can then and perhaps should interfere and exercise the discretion first vested in the lower court: see, *inter alia, Louis Blom-Cooper* v. *Attorney-General.*(6) Here it is obvious that the State Authority has refused to exercise its discretion because of the wrong interpretation given to the section that a columbarium is not a place used exclusively for religious worship and therefore the discretion has been exercised wrongly in the sense that it has been exercised without a full and proper consideration of its scope, or, as one suspects, in the sense that the occasion did not arise for its exercise to be considered. In this view, I am of the opinion that in so far as the rates for 1977 are concerned, the matter should be referred to the State Authority for its decision, in all the circumstances of the case whether or not to extend the discretion which is available to the columbarium.

For these reasons, I would allow the appeal with costs here and in the court below.

Raja Azlan Shah and **Syed Othman F.JJ.** concurred.

Appeal allowed.

Solicitors: *Chandran & Co.; Presgrave & Matthews.*

PERNAS TRADING SDN. BHD. v. PERSATUAN PELADANG BAKTI MELAKA

[F.C. (Raja Azlan Ag. C.J. (Malaya), Wan Suleiman & Salleh Abas F.JJ.) February 2 & March 10, 1979]

[Johore Bharu — Federal Court Civil Appeal No. 58 of 1978]

Contract — Sale of goods — Sales invoice and delivery note showing goods ordered by and delivered to respondents — Defence that goods ordered for third party — Oral evidence to contradict documents.

Principal and Agent — When agent personally liable — Summary judgment.

Practice and Procedure — Application to sign final judgment — No valid defence — R.S.C., 1957, O. 14.

In this case the appellants sued the respondents for the balance of the price of goods sold and delivered to the respondents. In their defence the respondents denied liability and sought to show that the goods were ordered for a third party. The appellants applied for leave to sign final judgment but their application was dismissed by the Senior Assistant Registrar and on appeal against the Registrar's decision, the learned judge dismissed the appellants' appeal. The appellants then appealed to the Federal Court.

Held, allowing the appeal: (1) it was quite clear from the sales invoice and the delivery note that the goods were ordered by the respondents;

(2) the respondents should not be allowed to bring oral evidence to contradict the terms of the contract and to show that the goods were ordered for a third party;

(3) in this case the sales invoice and the delivery note showed that even if the respondents were agents for a third party, Syahazam, in respect of the sale and delivery of the goods they were contracting in such form as to make them personally responsible.

Cases referred to:-

(1) *Higgins* v. *Senior* 151 E.R. 1279.

(2) *Jones* v. *Littledale* 6 Ad. & Ell 486; 1 Nev & P. 677.

The following cases were also cited in argument: *Birkmyr* v. *Darnell* 91 E.R. 27, *Tan Yew Lai* v. *Shadique* [1978] 1 M.L.J. 139, *United Malayan Banking Corporation Bhd.* v. *Datuk Sri Chan Swee Ho* [1978] 1 M.L.J. 222, *Ching Yuen Tung* v. *B.E.P. Akitek* [1978] 1 M.L.J. 211, *Norman Stanley & Co. Ltd.* v. *Siddique* [1956] 1 Lloyds L.R. 312, *Thorne* v. *Steel* [1878] W.N. 215.

FEDERAL COURT.

G.S. Nijar for the appellants.

Zulkifli bin Ismail Mohammed for the respondents.

Cur. Adv. Vult.

Salleh Abas F.J.: In this case the appellants sued the respondents for a sum of $22,997.76 being the balance of the price of chemicals and fertihsers sold and delivered by the appellants to the respondents. In their defence, the respondents denied liability and went on to claim that it was made known to the appellants at the time of the order that the ultimate buyer was Syahazam Sdn. Bhd.; in other words the defendants claimed that in the purchase of these goods they were agents for Syahazam Sdn. Bhd.

The appellants took out summons-in-chambers under Order 14 applying for leave to sign final judgment against the respondents on the ground that the respondents' defence "is sham, vexatious and is merely to delay normal proceedings". The summons came before the Senior Assistant Registrar who dismissed it, and on appeal against the Registrar's decision, Mr. Justice Datuk Syed Othman dismissed the appellants' appeal, and hence the appellants appeal further to the Federal Court.

The appellants' case is founded on the sales invoice dated July 26, 1976, stating that the goods in question were sold to the respondents (Persatuan Peladang Bakti Melaka, 132, Jalan Hang Tuah, Melaka), and on the delivery note of the same date showing that the goods were received by the respondents whose rubber stamp was impressed on the line entitled "Tanda Tangan Penerima Dan Chop Perniagaan". Zainab binti Tamby who signed the delivery note on behalf of the respondents in her affidavit sworn on December 21, 1977, admitted ordering the goods but denied that she did so on behalf of the respondent. She claimed that the goods were in fact "ordered for and on behalf of and on account of Syahazam Sdn. Bhd.". Paragraph 5 of her affidavit says: —

"... the goods referred to in the statement of claim were ordered by me, not on the association's behalf, but for and on behalf and on account of the Syahazam Sdn. Bhd. I now produce a copy of a letter from the said Syahazam Sdn. Bhd. (marked "2 T1") dated October 14, 1977, admitting liability in the plaintiff's claim."

According to Mohamed Noordin bin Haji Daud who swore an affidavit on behalf of the appellants on November 8, 1977, Syahazam Sdn. Bhd. had a separate account with the appellants and were in fact an adjudged debtor to the appellants for the sum of